Supreme Court, U.S.
FILED
JUL 17 2002
OFFICE OF THE CLERK

No. 01-1127

IN THE

Supreme Court of the United States

BILL LOCKYER,
ATTORNEY GENERAL OF CALIFORNIA,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FAMILIES TO AMEND CALIFORNIA'S THREE STRIKES AND CONGRESS OF CALIFORNIA SENIORS IN SUPPORT OF RESPONDENT

GERALD F. UELMEN
Counsel of Record
SANTA CLARA UNIVERSITY SCHOOL OF LAW
500 EL CAMINO REAL
SANTA CLARA, CALIFORNIA 95053
(408) 554-5729

Attorney for *Amici Curiae*

TABLE OF CONTENTS

Page

Interest of *Amici Curiae* 1

Summary of Argument 2

I. The Enactment of the "Three Strikes" Law in California 5

II. Deferring to the Legislative Process That Produced California's "Three Strikes" Law Would Undercut The Constitutional Guarantee of a Republican Form of Government 11

III. Proportionality Review is Fully Consistent With California Penological Theory 16

IV. Proportionality Review of California's "Three Strikes" Law Would Not Impair the Values of Our Diverse Federal System 18

V. Proportionality Review of California's "Three Strikes" Law Can Be Guided by An Objective Standard That Requires the Triggering Offense for a Life Sentence To Be a Serious Felony 19

Conclusion 21

TABLE OF AUTHORITIES

Page(s)

CASES:

In Re Foss, 10 Cal.3d 910 (1974) 17

In Re Grant, 18 Cal.3d 1 (1976) 17

Harmelin v. Michigan, 501 U.S. 957, 998 (1991) 2, 14, 19

Kadderly v. City of Portland, 74 P. 710, 720 (Or. 1903) ... 13

In Re Lynch, 8 Cal.3d 410 (1972) 17

Manduley v. Superior Court, 27 Cal.4th 537 (2002) 10

Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) 13

People v. Anderson, 6 Cal.3d 628 (1972) 17

People v. Fryman, 97 Cal.App.4th 1315 (2002) 11

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 15

Reitman v. Mulkey, 387 U.S. 369 (1967) 15

Romer v. Evans, 517 U.S. 620 (1996) 15

Washington v. Seattle School Dist. No. 1, 455 U.S. 457 (1982) 15

CONSTITUTIONAL PROVISIONS:

U.S. Const., Art. IV, Section 4 11

Calif. Const., Art. I, Section 17 17

Calif. Const., Art. I, Section 27 17

Calif. Const., Art. II, Section 8(d) 10

Calif. Const., Art. II, Section 10(c) 3, 9

Table of Authorities (Continued)

Page(s)

STATUTES:

Calif. Health & Safety Code § 1210, 1210.1 ..... 10, 11

Calif. Penal Code §§ 499, 499b 20

Calif. Penal Code, § 667 9

Calif. Penal Code §1170 ..... 4, 17

Calif. Penal Code § 1192.7 10

Calif. Welf. & Inst. Code § 602, 707 10

OTHER AUTHORITIES:

California Assembly Committee on Public Safety, *Committee Analysis of A.B. 1652,* 2000-01 Leg., at 3 (Cal. Apr. 24, 2001) 11

58 Cal. Jur. 3d, Statutes § 50 9

Campaign for an Effective Crime Policy, *"Three Strikes" Laws: Five Years Later,* Washington, D.C., 1998 18

Clark, Austin & Henry, *Three Strikes and You're Out: A Review of State Legislation,* Nat'l Institute of Justice, Washington, D.C. 1997 18

Eule, *Judicial Review of Direct Democracy,* 99 Yale L.J. 1503, 1527 (1990) 12, 14, 16

THE FEDERALIST, No. 63, at 428 (J. Madison) . 12, 14, 15

Hecht, "Two Grieving Fathers Part Ways on '3 Strikes' Crusade," Sacramento Bee, July 10, 1994, p. A1 6

Table of Authorities (Continued)

Page(s)

Morain, "A Father's Bittersweet Crusade, Mike Reynolds Vowed that His Murdered Daughter Would Not Die in Vain; Few Thought He Would Win, But Today He Will See the 'Three Strikes' Bill Signed Into Law," Los Angeles Times, March 7, 1994, p. A1 6-7

Schrag, *Paradise Lost* (New Press, 1998) 7, 8

Skelton, "Wilson Seizes the Day After Polly's Murder," Los Angeles Times, Dec. 13, 1993, p. A3 6

SUTHERLAND STATUTORY CONSTRUCTION, § 22.2, at pp. 244-45 (6th Ed. 1996) 9

Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After* Senate v. Jones, 41 Santa Clara L. Rev. 999 (2001) 10

Willkie, "Prop. 184: 3 Strikes Already on Books, Foes Say Its Passage Only Bolsters a Bad Law," San Diego Union, Oct. 12, 1994, p. A1 5

Zimring, Hawkins & Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford Univ. Press 2001) 5, 7

39 Authors, *The Jurisprudence of Yogi Berra,* 46 Emory L.J. 697, 727 (1997) 19

Interest of *Amici Curiae*[1]

Amici are concerned citizens, family members, and friends of persons sentenced under California's Three Strikes Law for non-violent low-level offenses. *Amici* share with all Californians a steadfast concern for public safety and fervent desire to reduce crime. But while *amici* are sympathetic to the impulse to "do more" to fight crime, we are deeply troubled by the grossly disproportionate sentences that have flowed from the wide net cast by California's Three Strikes Law. For reasons we explain herein, our experience convinces us that California's sentencing scheme stands as an anomaly within the nation and is deserving of a proportionality review by this Court.

Amicus curiae Families to Amend California's Three Strikes ("FACTS") is a California-based organization begun in 1996 dedicated to reforming California's Three Strikes Law to bring it into conformity with the so-called "three strikes" laws of the other states by restricting its application to violent offenders only. FACTS, through its membership and more than a dozen chapters throughout California, engages in a variety of public education efforts to inform the public and policy makers about the statewide implementation and impact of Three Strikes. To this end, FACTS tracks the implementation of the Three Strikes Law, collects academic research, court opinions and news reports concerning the law, compiles the personal and family stories of individuals currently serving sentences of 25 years to life as a result of "third strike" convictions for low-level non-

[1] The parties have consented to the filing of this brief. It was not authored in any part by counsel for a party, and the Center for Policy Reform made a monetary contribution toward its preparation.

violent offenses, and helps coordinate individuals and organizations to speak out on behalf of Three Strikes reform.

Amicus curiae Congress of California Seniors ("CCS") is a non-profit advocacy organization established in 1977 dedicated to improving the quality of life for seniors and their families. As an umbrella organization for hundreds of affiliated senior groups and individuals, CCS has a combined membership of over 650,000 Californians. The broad-based CCS coalition, which includes senior centers, retired-public-employee organizations and trade unions, has emerged as a major voice for California seniors at the state capitol and beyond.

Summary of Argument

Justice Kennedy's concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) identified four common principles which give content to the uses and limits of proportionality review. The first of these principles is substantial deference to the judgments of state legislatures, where substantive penological judgments are most appropriately balanced. 501 U.S. at 998-999. The second of these principles is the lack of constitutional mandate for any particular theory of punishment, noting that different weights have been accorded at different times to the often competing goals of retribution, deterrence, incapacitation and rehabilitation. 501 U.S. at 999.

The third principle values the diversity which is an inevitable result of our federal system. The mere fact that a state has the most severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. 501 U.S. at 999-1000. The fourth principle requires that proportionality review be guided by objective factors. 501 U.S. at 1000-1001.

This brief will focus upon these four guiding principles in the context of California's "Three Strikes Law" enacted in 1994. This context is unique in several respects. Although the identical measure was enacted by both the California legislature and popular initiative, no legislative hearings were ever conducted and no penological experts were consulted in its drafting. There was no legislative compromise or amendment affecting any of its language. An emotional reaction to one horrendous crime was manipulated to present the electorate with an "all or nothing" approach to an extremely complex matrix of options.

While a legislative enactment can subsequently be amended at any time, the California constitution provides that initiative measures can only be amended by subsequent initiatives, unless the measure itself provides otherwise. Calif. Const., Art. II, Section 10(c). The "Three Strikes" initiative provides that any amendments will require a two-thirds vote of the legislature or a subsequent initiative measure. Two subsequent initiative measures have modified the "Three Strikes Law," introducing even more anomalies and contradictions.

In their Opening Brief, Petitioners suggest that "over time the attitude of the citizens of California may change. In the meantime, however, deference should be at its apex. . . ." [Pet. Opening Brief, p. 16]. Unfortunately, the super-majority or subsequent initiative requirements imbedded in the "Three Strikes Law" were deliberately designed to frustrate any efforts to ameliorate the measure. Deference is inappropriate for a setting in which laws are enacted in an emotional paroxysm without deliberation or compromise, and subsequent amendment or correction is practically precluded. The principle of deference is designed to promote the goals of federalism and our republican form of government. California's initiative process is the antithesis

of the republican form of government. In this setting, deference should be at its nadir.

The context of California's "Three Strikes Law" is also unique with regard to California's explicit recognition of a controlling theory of punishment. In 1976, California rejected an indeterminate sentencing system and adopted a determinate sentencing scheme which explicitly recognized proportionality as its goal. In Penal Code Section 1170, the legislature declared:

> [T]he purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

This commitment to proportionality was not undermined or modified by the enactment of the "Three Strikes Law," although its operation may occasionally result in grossly disproportionate sentences, as it did in this case. Thus, in applying a constitutional standard to forbid extreme sentences that are grossly disproportionate to the crime, this Court would not be mandating adoption of a penological theory rejected by California, but actually promoting the penological theory explicitly embraced by the state.

The diversity promoted by our federal system is fully reflected in the variety of "Three Strikes" measures adopted by twenty-five states and the federal government. But with one singular exception, these measures all reflect a consistent judgment that a serious felony must be the triggering offense to justify a life sentence for a repeat offender. California stands alone in the breadth of its measure. And with one singular exception, all of these measures can be ameliorated

by subsequent amendment by a majority vote of Congress or the state legislature. California stands alone in imposing a supermajority requirement for amelioration. A ruling that grossly disproportionate sentences violate the federal constitution will not discourage diverse approaches to sentencing. It will merely insure that a "safety valve" can correct extreme injustices which may not have been fully anticipated upon enactment, but become apparent only with hindsight.

Finally, an objective standard is readily available to inform proportionality review in this case. The penalty of life imprisonment without parole differs from other forms of punishment, and the use of petit theft as a triggering offense to escalate punishment from a discretionary sentence of up to one year in the county jail to a mandatory sentence of 50 years to life in state prison is objectively extreme and grossly disproportionate to the crime.

I. The Enactment of the "Three Strikes" Law in California.

California's "Three Strikes" law has been aptly described as "an extreme example of a populist preemption of criminal justice policy making." Zimring, Hawkins & Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford Univ. Press 2001), p. 3. First proposed by Mike Reynolds, the Fresno father of a murder victim, the measure was put on the California ballot by an alliance of two groups active in lobbying for crime victims: the California Correctional Officers Association (the prison guards union) and the National Rifle Association. Willkie, "Prop. 184: 3 Strikes Already on Books, Foes Say Its Passage Only Bolsters a Bad Law," San Diego Union, Oct. 12, 1994, p. A1. The campaign for its enactment was bolstered when 12-year-old Polly Klaas was abducted from

her Petaluma home, sexually assaulted and murdered by a twice-convicted violent offender recently paroled from state prison. The case generated a media frenzy, and California's then Governor Pete Wilson, preparing for a hotly contested reelection contest against Kathleen Brown, the daughter of one former Governor and the sister of another, announced his endorsement of the Reynolds "Three Strikes" proposal at the funeral of Polly Klaas. Skelton, "Wilson Seizes the Day After Polly's Murder," Los Angeles Times, Dec. 13, 1993, p. A3.

Democrats were in control of the state legislature, and their concern that the Governor would co-opt the "tough on crime" sentiment generated by the Polly Klaas murder produced an unusual game of "chicken" between the governor and the legislature, remarkable even for California politics. Five different versions of proposals for increased sentences for repeat offenders had been introduced in the state legislature, including one identical to the Reynolds proposed initiative. Mark Klaas, the father of murder victim Polly Klaas, at first endorsed the Reynolds proposal, but later campaigned against it and endorsed a less sweeping "Three Strikes" law which was also endorsed by the California District Attorneys Association. It would have required the third strike to be a serious or violent felony, the same as the first two strikes. Hecht, "Two Grieving Fathers Part Ways on '3 Strikes' Crusade," Sacramento Bee, July 10, 1994, p. A1.

The legislative leadership announced it would pass whatever version of "Three Strikes" the Governor selected. The Governor's choice of the most extreme version, the Reynolds measure headed for the ballot in initiative form, then induced the legislature to enact legislation virtually identical to the proposed initiative, to deprive the Governor of a campaign issue. Morain, "A Father's Bittersweet Crusade, Mike Reynolds Vowed that His Murdered

Daughter Would Not Die in Vain; Few Thought He Would Win, But Today He Will See the 'Three Strikes' Bill Signed Into Law," Los Angeles Times, March 7, 1994, p. A1.

The legislative process that produced California's "Three Strikes" law was unique for the absence of analytic attention from criminal justice professionals and academic experts prior to enactment, and the complete lack of any "fine tuning" by elected power brokers in the legislature or governor's office. There were no legislative hearings and no amendments were ever proposed or considered. A proposal drafted by a special interest lobbying group with no public input literally sailed to enactment untouched by human hands. Zimring, Hawkins & Kamin, *supra* at 11-13. To some extent this was attributable to the one-time frenzy which the horror of the Polly Klaas murder injected into a contentious political campaign, but to an even greater extent it was attributable to the role that the initiative process has come to play in California government.

The displacement of elected government officials as policy makers by the California initiative process is dramatically demonstrated by Peter Schrag, an astute long-time observer of California government, in *Paradise Lost* (New Press, 1998). During the past two decades, he writes, "California has been in nearly constant revolt against representative government." *Id.* at 9-10. A long succession of broad ballot initiatives promoted by interest groups have mandated or prohibited major programs and policies, imposing supermajority requirements for legislative action.

> Paradoxically, the further the initiative process goes, the more difficult and problematic effective citizenship becomes. California has not just seen a sharp decline in the quality of public services – education, public parks, highways, water projects –

> that were once regarded as models for the nation. It has also seen the evolution of an increasingly unmanageable and incomprehensible structure of state and local government that exacerbates the same public disaffection and alienation that have brought it on, thus creating a vicious cycle of reform and frustration. Each measure, because it further reduces governmental discretion, and because it moves control further from the public – from local to state government, from the legislature to the constitution, from simple majorities to supermajorities – makes it harder to write budgets, respond to changing needs, and set reasonable priorities

Schrag, *supra* at 11-12.

The legislative enactment of the harshest version of "Three Strikes" would logically have led to abandonment of the campaign to enact the measure as an initiative. Why spend money to promote a ballot measure which the legislature has already adopted? The reason the initiative campaign proceeded, however, is precisely the reason why California's "Three Strikes" law deserves so little deference from this Court. Enactment of the initiative was sought to "protect" the measure against subsequent amelioration by legislative amendment.

The measure passed by the legislature being a word-for-word copy of the proposed initiative, it contains the "supermajority for amendment" proviso that characterizes many California initiatives:

> The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute

> that becomes effective only when approved by the electors.

Stats. 1994, ch. 12, p. 75; Calif. Pen. Code, § 667(j). The measure dispensed with the supermajority requirement, however, for legislative measures *increasing* the length of sentences. Stats. 1994, ch. 12, p. 72; Calif. Pen. Code § 667 (a) (3). In other words, subsequent legislatures could amend the law at will to make it harsher, but any ameliorative amendments would require a two-thirds majority. This attempt to limit subsequent amendment was patently invalid,[2] and its inclusion is an amusing example of how the legislature completely abandoned its normal function of drafting and debating statutory language in its haste to jump on the "Three Strikes" bandwagon. Only an initiative could achieve the desired limitation on the authority of subsequent legislatures.

The subsequently enacted initiative thus did more than "ratify" the previously enacted legislation. It enhanced its status to take full advantage of Article II, Section 10(c) of the California Constitution, which provides:

> The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

The difficulty of mustering a two-thirds majority in the California legislature and the enormous cost of preparing, promoting and passing an initiative measure render the

---

[2] A legislature cannot limit the power of amendment of a subsequent legislature, either as to the extent or manner of its exercise. SUTHERLAND STATUTORY CONSTRUCTION, § 22.2, at pp. 244-45 (6th Ed. 1996). *Cf.* 58 Cal. Jur. 3d, Statutes § 50, at p. 383 (1980).

"Three Strikes" law virtually untouchable. Only two subsequent amendments have been achieved by incorporating modifications in initiative measures designed to achieve other purposes.

On March 7, 2000, California voters approved Proposition 21, which gives prosecutors discretion to prosecute specified categories of juvenile offenders as adults without the previously required judicial approval. Calif. Welf. & Inst. Code § 602, 707 (2000). This initiative also substantially expanded the list of serious or violent felonies which count as "strikes" to make *all* defendants eligible for sentencing under the "Three Strikes" law. Calif. Pen. Code § 1192.7 (2000). The constitutionality of Proposition 21 was challenged under the requirement of California Constitution Article II, Section 8 (d) that initiative measures address a "single subject," because it combined major reforms of juvenile court procedure with an expansion of the "Three Strikes" law. That challenge was rejected by the California Supreme Court in *Manduley v. Superior Court,* 27 Cal.4th 537 (2002). The California Supreme Court has invalidated only one initiative for violating the "single subject" rule since that requirement was added to the California constitution in 1948. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After* Senate v. Jones, 41 Santa Clara L. Rev. 999 (2001).

On November 7, 2000, the California electorate enacted Proposition 36, which mandates that drug offenders convicted of simple possession be placed on probation and put in drug treatment programs. Calif. Health & Safety Code § 1210, 1210.1 (2001). A defendant is excluded from Proposition 36 if he has been previously convicted of a serious or violent felony, unless there has been a period of more than five years in which the defendant remained free of prison custody and was not convicted of any felony offense

other than a nonviolent drug possession offense or of any misdemeanor involving threatened or actual physical injury to another person. Calif. Health & Safety Code § 1210.1(b)(1). But for Proposition 36, a non-excluded defendant with a prior conviction of a serious or violent felony would receive a mandatory prison sentence under the "Three Strikes" law, and receive life imprisonment if he had two such priors. As of February 28, 2001, 637 persons have received life sentences under the "Three Strikes" law for a third felony offense of possession of a small amount of drugs. California Assembly Committee on Public Safety, *Committee Analysis of A.B. 1652,* 2000-01 Leg., at 3 (Cal. Apr. 24, 2001). This has created serious disparity in the treatment of many drug offenders in California. If a defendant had two serious prior felonies, regardless of how old the convictions were, and he was convicted of drug possession prior to July 1, 2001 (the effective date of Proposition 36), he was sentenced to life imprisonment. The same defendant, if five years had elapsed since he served time for his priors, would automatically be sentenced to probation under Proposition 36. This disparity led at least one California court to declare that Proposition 36 must be applied retroactively to avoid a constitutional problem of denial of equal protection of the laws. *People v. Fryman,* 97 Cal.App.4th 1315 (2002).

II. Deferring to the Legislative Process That Produced California's "Three Strikes" Law Would Undercut The Constitutional Guarantee of a Republican Form Of Government.

Article IV, Section 4 of the United States Constitution provides:

> The United States shall guarantee to every state in this Union a Republican Form of Government. . . .

This guarantee reflects a fundamental commitment to representative government, as contrasted with the "pure democracies of Greece." THE FEDERALIST, No. 63, at 428 (J. Madison). Placing lawmaking power in the hands of elected representatives insures that legislation is the product of a deliberative process which offers "time for reflection, exposure to competing needs, and occasions for transforming preferences." Eule, *Judicial Review of Direct Democracy,* 99 Yale L.J. 1503, 1527 (1990).

Amici do not contend that the initiative process itself, as it exists in most states that permit it, is a repudiation of the republican form of government. In most of these states, laws enacted by initiative are treated the same as laws enacted by the legislature; they may be subsequently amended or repealed by the legislature. California, however, has gone a step beyond this concept of shared legislative power. In California, an initiative enactment is given an elevated, exalted status that places it beyond the reach of the ordinary power of the legislature. Under the California constitution, an initiative statute becomes as difficult to amend or repeal as a constitutional provision. The initiative statute which enacted California's "Three Strikes" law provides:

> The provisions of this measure shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Initiative Measure No. 184, Section 4, Stats. 1994, at p. A-317. Thus, amelioration of the unusually harsh sentences mandated by the "Three Strikes" law cannot be achieved by the ordinary legislative process. A supermajority must be

assembled, or a new initiative campaign must be financed and mounted.

It is precisely this feature of California initiatives that renders them anti-republican. In the earliest state court opinion upholding the initiative and referendum process, the Oregon Supreme Court defended lawmaking by plebiscite only to the extent that it did not interfere with the continued authority of elected representatives. *Kadderly v. City of Portland,* 74 P. 710, 720 (Or. 1903). This meant that ordinary laws could not be put beyond legislative reach, by placing them in the state's constitution or by other special obstacles to later legislative action. Linde, *State Courts and Republican Government,* 41 Santa Clara L. Rev. 951, 963 (2001).

In 1912, this Court dismissed a challenge to an Oregon initiative which claimed the enactment of a tax by the initiative process violated the guarantee of a republican form of government. *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118 (1912). The Court read the words "The United States" in the Guarantee Clause to place the onus for keeping state governments republican on the federal political branches rather than the federal courts. This allocation of federal power rendered the guarantee "not justiciable" in the Supreme Court. 223 U.S. at 151. This ruling should pose no obstacle, however, when the issue presented is the degree of deference this Court should give to the laws enacted by an initiative process which limits subsequent action by the legislature. Although speaking in broader terms, the late Professor Julian Eule succinctly put the argument:

> In the end, my claim is that direct democracy is constitutionally suspect, not impermissible. It triggers a harder judicial look. This argument is not

> hampered by the justiciability problems that surround the republican form clause, for I do not contend this clause should be the lens under which direct democracy will be scrutinized. My argument instead is that when laws enacted by plebiscite are challenged under *other* provisions of the federal constitution, the republican form clause informs the nature of the judicial role.

Eule, *supra* at p. 1545. *Amici* do not advocate heightened scrutiny for *all* laws enacted by initiative, however, as does Professor Eule. We limit our argument to initiatives which disarm elected legislatures from subsequent amelioration. This approach particularly recommends itself when the constitutional lens through which legislation is being scrutinized is the prohibition of cruel and unusual punishment in the Eighth Amendment. The fundamental balancing of competing penal policies and theories, and the tempering of inflamed passions, is particularly suited to the deliberative process of representative government. As noted in Justice Kennedy's concurring opinion in *Harmelin, supra* at 998:

> Determinations about the nature and purpose of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law and the social order. "As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements." D. Garland, Punishment and Modern Society 1 (1990).

These words echo a theme which runs throughout The Federalist. "[T]here are particular moments in public affairs," Madison opined in The Federalist No. 63, "when the

people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will be the most ready to lament." THE FEDERALIST, No. 63 at 425; *see also id.*, No. 10 at 60-61; No. 49 at 343; No. 71 at 482. California's "Three Strikes" law was clearly responsive to "irregular passion" aroused by a horrendous crime and artful politicians. As noted in Petitioner's Opening Brief (p. 16), the citizens of California may, at some point, lament the severity of their response. The problem with the California initiative process, however, is that lamentation encounters greater legislative obstacles than the original passion. Representative or republican government is stymied.

This, of course, is not the first case in which this Court has reviewed the constitutionality of state laws enacted by popular initiative. That case was *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), where the Court invalidated an Oregon initiative inspired by the Ku Klux Klan which imposed criminal penalties upon parents who sent their children to parochial schools. Subsequent cases have subjected initiative measures to strict scrutiny, not because they were enacted by initiative, but because they involved racial discrimination or impinged upon First Amendment rights. *E.g., Romer v. Evans,* 517 U.S. 620 (1996) [Referendum Measure permitting discrimination against gays and lesbians]; *Washington v. Seattle School Dist. No. 1,* 455 U.S. 457 (1982) [Initiative Measure prohibiting school busing to achieve desegregation of schools]; *Reitman v. Mulkey,* 387 U.S. 369 (1967) [Initiative Measure permitting racial discrimination in sale or leasing of real property]. This is, however, the first case in which Eighth Amendment proportionality review is sought for a criminal sentencing measure enacted by popular initiative. Traditional deference to the state legislative process is especially inappropriate

when the process impairs the normal protections of our republican form of government. In this setting, the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities the the constitution seeks to dissipate. Eule, *supra* at p. 1525.

III. Proportionality Review is Fully Consistent With California Penological Theory.

There need be little concern in this case that proportionality review will impose a penological theory of punishment upon California that is in any way inconsistent with current and prevailing theories embraced by the state. California's "Three Strikes" law did not explicitly embrace any theory of punishment, other than to lock up felons as long as possible. The purpose of the law is stated in its first paragraph:

> It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

Stats. 1994, ch. 12, p. A-314. Imposing greater punishment on recidivists can be justified by any or all of the competing theories of the purpose of punishment: retribution, deterrence, incapacitation, and even rehabilitation. California's "Three Strikes" law did not offer any of these justifications, but simply and forthrightly declared its purpose to be "greater punishment" for certain repeat offenders. This is fully consistent with, and must be construed in conformity with, prior declarations of the

purpose of punishment contained in California law. The most direct declaration of the purpose of punishment found in California law is contained in Section 1170 of the California Penal Code, adopted in 1976:

> [T]he purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

A commitment to proportionality of punishment is also embedded in the California constitution, which contains a prohibition of "cruel *or* unusual punishment." Calif. Const., Art. I, Section 17. In *People v. Anderson,* 6 Cal.3d 628 (1972), the California Supreme Court seized upon the disjunctive nature of this prohibition to declare California's death penalty law unconstitutional. The constitution was later amended to declare that the death penalty is "neither cruel nor unusual punishment," Calif. Const., Art. I, Section 27, but the prohibition is still stated in the disjunctive. In numerous cases, the California Supreme Court has construed this clause to impose a requirement of proportionality in sentences of imprisonment. *In Re Lynch,* 8 Cal.3d 410 (1972); *In Re Foss,* 10 Cal.3d 910 (1974); *In Re Grant,* 18 Cal.3d 1 (1976).

Thus, there is little or no risk that applying constitutional proportionality review to sentences imposed under California's "Three Strikes" law will impose a penological theory that California has rejected. California has embraced proportionality as the principal goal of its sentencing laws in both its constitution and its Penal Code, and the "Three Strikes" law is fully consistent with that goal.

IV. Proportionality Review of California's "Three Strikes" Law Would Not Impair the Values of Our Diverse Federal System.

Between 1993 and 1996, twenty-five states and the federal government all adopted some form of legislation utilizing the popular baseball metaphor, "Three Strikes and You're Out." Clark, Austin & Henry, *Three Strikes and You're Out: A Review of State Legislation,* Nat'l Institute of Justice, Washington, D.C. 1997. The impact of most of these laws has been symbolic. A 1998 survey revealed that fourteen states had sentenced fewer than ten defendants under their "Three Strikes" laws, the entire federal system had sentenced thirty-five, and no state except California had accumulated more than 1,000 "Three Strikes" sentences. In California, 40,000 defendants had been sentenced under the new law. Campaign for an Effective Crime Policy, *"Three Strikes" Laws: Five Years Later,* Washington, D.C., 1998.

The primary reason for the huge impact of the California law was the unique breadth of its coverage. Only one prior qualifying felony is necessary before expanded and mandatory imprisonment is required, and a third strike sentence of life imprisonment is invoked by any triggering felony conviction, including petit theft if a prior felony conviction is present. Other "Three Strikes" laws only aggravate penalties after two prior strikes and require at least a serious felony theft conviction to trigger the third-strike penalties. Clark, Austin & Henry, *supra.*

California stands alone in permitting any felony to serve as the triggering offense. One consequence of this overbreadth is that many relatively minor transgressions are swept up in the California Penal Code's classification of felonies to include "wobblers": offenses that can be treated as either a felony or a misdemeanor. Thus, in this case, a

petit theft ordinarily punishable by up to one year in the county jail was escalated to a felony because of the defendant's prior conviction, then the felony was escalated to a third strike to mandate a life sentence. While we might value the diversity of a federal system that allows California to stand alone, the imposition of a minimal constitutional standard will hardly impede further experimentation by the states. It might actually encourage experimentation by insuring that unforeseen excesses can still be remedied.

If the purpose of our federal system is to permit diverse experimentation by the states, the states must accept the responsibility to monitor their experiments and intervene to ameliorate unanticipated injustices. Every "Three Strikes" law adopted by 24 states and Congress can be modified or amended by a majority vote of the legislature. California also stands alone in imposing a supermajority requirement for amelioration. The value we attach to diversity should not extend to states which turn a blind eye to the possibility that their experiments may run awry. We should recognize the baseball wisdom of Yogi Berra, who observed, "Foresight is always better, afterward." 39 Authors, *The Jurisprudence of Yogi Berra,* 46 Emory L.J. 697, 727 (1997). In California, the value of delayed foresight is rejected by a rule demanding a supermajority to perform any fine tuning of the experiment.

V. Proportionality Review of California's "Three Strikes" Law Can Be Guided By An Objective Standard That Requires the Triggering Offense For a Life Sentence To Be a Serious Felony.

Two objective factors readily present themselves to guide proportionality review in this case. The first, described by Justice Kennedy as the "most prominent objective factor," *Harmelin,* 501 U.S. at 1000, is the type of

punishment imposed. A penalty of life imprisonment without parole differs from other forms of punishment in its total abandonment of any pretense of a rehabilitative purpose. The offender is being permanently removed from society. Unlike the prisoner given a term of years, who can mark the passage of those years on the wall of his cell, the "lifer" must abandon all hope of eventual release. Short of the death penalty, it is the most drastic form of punishment available, once reserved for those who murder with premeditation.

The second objective factor is the nature of the triggering offense. This Court should declare that a life sentence cannot be imposed upon a repeat offender whose offense is less than a serious felony. "Serious" felony can be defined as one punishable by *more* than one year in jail, excluding the California "wobbler" utilized in this case. California casts the net too wide, to encompass not only petit theft with a prior, as in this case, but even offenses involving no criminal intent to steal, such as temporary use of a bicycle without permission of the owner. Calif. Penal Code §§ 499, 499b. Permitting these relatively minor offenses to trigger a life sentence allows an escalation of the penalty far in excess of any legitimate penological purpose. In this case, absent the "Three Strikes" law, the maximum penalty the defendant faced was up to one year in the county jail, or a prison sentence of 16 months, 2 years or 3 years.

Another alternative to define "serious" felony would be to require the triggering offense to be just as serious as the offenses counted as priors. If, as under the California law, only serious or violent felonies can be counted as strikes, then only a serious or violent felony should function as the third strike. To escalate the penalty when the seriousness of the offender's criminality is deescalating serves no legitimate

purpose. Even in baseball, a foul ball is not counted as the third strike.

Conclusion

All four of the principles identified by Justice Kennedy as informing this Court's exercise of proportionality review support the appropriateness of such review in this case. Little or no deference should be given to an initiative process that impedes ameliorative measures. California's explicit endorsement of proportionality as serving the purpose of punishment invites proportionality review. The diversity of our federal system will not be impaired by the limited proportionality review proposed here, and objective factors are readily available to guide that review. For all of these reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

GERALD F. UELMEN
Counsel of Record
Santa Clara University School of Law
500 El Camino Real
Santa Clara, California 95053
(408) 554-5729

Attorney for Amicus Curiae